No. 14842.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FISHER CONSTRUCTION COMPANY, LTD.,

Appellant,

vs.

C. W. LERCHE,

Appellee.

Appeal From the District Court of Guam, Territory of Guam.

APPELLANT'S OPENING BRIEF.

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Suit was instituted in the court below by plaintiff, hereinafter referred to as appellee, against defendant, hereinafter referred to as appellant, for damages in excess of $3,000.00 alleged to have been suffered by appellee on account of a breach of a contract of employment. After trial, before the court sitting without a jury, judgment was entered in favor of appellee and against appellant in the sum of $3,200.00 and costs. This is an appeal from that judgment [Tr. pp. 15-16].

Jurisdictional Statement.

The court below acquired jurisdiction by virtue of Section 22(a) of the Organic Act of Guam (48 U. S. C.. Sec. 1424(a)), which provides in part as follows:

> "The District Court of Guam shall have, in all causes arising under the laws of the United States, the jurisdiction of a district court of the United States as such court is defined in section 451 of title 28, United States Code, and shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine."

Jurisdiction of this court to hear this appeal is conferred by the provisions of Title 28, U. S. C. 1291.

Statement of the Case.

Appellee was employed by appellant for a two-year period beginning September 17, 1952 [Tr. p. 28]. On the 29th day of September, 1952, the parties entered into a written agreement confirming the terms of employment, which said terms provided, *inter alia,* that appellee would work for appellant for a period of two years at a salary of $175.00 per week [Tr. pp. 6, 14]. Appellee's employment continued until May 24, 1954, when he was discharged by appellant [Tr. p. 14]. At that time, and from February 1, 1954, when appellant voluntarily raised appellee's wages, appellee was receiving the sum of $200.00 per week [Tr. p. 14].

Appellee thereupon filed this action to recover from appellant damages he allegedly suffered as a result of

his discharge [Tr. p. 14]. After trial by the court sitting without a jury, the court found that appellee would have earned the sum of $3,600.00 had he been permitted to complete the contract and further found that from the date of his discharge to the 29th day of September, 1954, appellant earned a total sum of $400.00. Consequently, it ordered judgment entered against appellant and in favor of appellee in the sum of $3,200.00.

The testimony further showed that between June 7, 1954, and September 29, 1954, appellee was employed by a building corporation known as Modern Builders and was to be paid "50 percent of the net" for his services [Tr. p. 33]. Appellee testified that there was no net profit for that period but that he had drawn the sum of $400.00 "against anticipated profits" [Tr. p. 33].

Appellant now appeals from the judgment entered in the court below [Tr. pp. 15-16] and contends that the record does not support a judgment in the amount awarded to appellee by the court below.

Specification of Errors Relied Upon.

(1) The court below erred in allowing appellant only $400.00 as an offset against the amount claimed by appellee.

(2) The court below erred in allowing appellee compensation to September 29, 1954, since the contract would have terminated on September 16, 1954.

(3) The court below erred in computing appellee's damages at $200.00 per week instead of $175.00 per week.

ARGUMENT.

I.

Since Appellee, Shortly After Being Discharged by Appellant, Entered Into the Employ of Another Contractor for a Percentage of That Contractor's Profit, Appellant Should Have Been Relieved of Any Obligation to Pay for Appellee's Services During the Period That Appellee Was so Employed.

In actions for damages arising out of dismissal from employment before the termination date of an employment contract, the employee is not necessarily entitled to the amount he would have received under the contract had he served until its termination date. As Cordozo, C. J., stated in his concurring opinion in *McClelland v. Climax Hosiery Mills,* 252 N. Y. 347, 358-359, 169 N. E. 605, 609 (1930):

> "Upon a wrongful discharge of a servant during the term of employment, the *prima facie* measure of damage is the wage that would be payable during the remainder of the term. [Citations.] This is only the *prima facie* measure. There is no fixed and certain obligation on the part of the master to respond in damages for that amount. The obligation of the master is merely to pay whatever damages have actually been suffered, and these exclude damages that a servant, acting reasonably, would have diminished or avoided. . . ."

To the same effect, see 35 Am. Jur. 489-490, where the rule is stated as follows:

> ". . . the amount of damages recoverable for an employer's breach of a contract of employment for a determinate period, by an employee who has been

> improperly dismissed before the expiration of the term of service, though *prima facie* an amount equivalent to the compensation stipulated for in the contract of employment, is to be reduced by the amount of any sums which previously were paid on account to the plaintiff under the contract of employment, and by the amount of actual earnings of the plaintiff from another employer during the remainder of the term of the contract, regardless of the nature of such employment, or by the profits of a business in which he has engaged in on his own account, realized during the term which the employment contract was to remain in force." (Footnotes to the supporting cases have been omitted.)

The initial question here to be considered is whether the court below, in light of that principle of law, correctly assessed damages for the full balance of the contract in view of the fact that appellee was employed by another contractor for a substantial portion of that period.

Appellee testified that he was discharged on May 24, 1954, and began working for Modern Builders on June 7, 1954 [Tr. p. 33]. The terms of his contract with his new employer entitled him to "50 percent of the net" realized by Modern Builders [Tr. p. 33]. Appellee further testified that in fact there was no net profit "From the period of June 7, 1954, to September 29, 1954" [Tr. p. 33]. During that period, however, he drew about $400.00 on account of anticipated profits.

We respectfully submit that since appellee was able to find employment in his trade and since he chose to work for a percentage of the net profit, he should not now be allowed to recover for the period he was employed although he testified that no net profit was actually realized.

To begin with, the record does not establish that a profit was not realized during the period in question. While appellee testified that no net profit was realized during the period June 7 to September 29, 1954, the testimony is ambiguous. Did appellee mean that if the books were closed on September 29 they would have shown no profit for that period or did he mean that no profit was realized for the work performed during that period? It may very well have been that payment had not been received for work performed during the period June 7-September 29 until after September 29, 1954. If such were the case, appellee might very well report no profit received or distributed as of September 29 although a profit for the period was actually realized and received at a later date. If in fact money was actually received after the close of the period for work done during the period, appellant should have received a credit therefor.

The same defect appears in connection with the drawing account. An analysis of the testimony at page 33 of the Transcript indicates only that appellee drew the sum of $400.00 against anticipated profits during the period in question. Actually, appellant was entitled to any allowances that appellee drew whether during that period or after, so long as they were attributable to the period in question. The record is silent on this question.

Of course, whether appellant is entitled to a greater offset than allowed by the court in view of the aforementioned deficiencies in the record must be resolved in accordance with the rules governing the burden of proof. On this question there is a division of authority. While the prevailing rule seems to be that the burden of proof is on the employer to establish any offsets, several juris-

dictions place the burden upon the employee. The cases on both sides are collected in an extensive annotation at 134 A. L. R. 242. The majority view is generally supported by the argument that an employer is in as good position to know the prevailing labor market as the employee, for which reason the burden is properly on the defendant who raises the issue. This may be a proper rule in the ordinary case of discharge of an employee by an employer, although, as we will show, there is equal logic to the argument that proof of damage is a necessary element of plaintiff's case and therefore his burden. But the instant case is not an ordinary case; it is a peculiar one for the reason that we do not here have the ordinary situation of a discharged employee being unable to find other employment or obtaining employment of another kind at a lesser wage, about which the other cases generally speak. Rather, we have an employee who was willing to gamble on his wages by working for a percentage of profit and agreeing to a manner of compensation that could not be readily calculated except by someone familiar with the business. This is an altogether different problem.

In situations where an employee has been unable to secure employment, it is fair to argue that the employer is in as good a position to present the matter of mitigation of damages as the employee. We will show in a moment that even this position is not uniformly accepted. However, where the employee enters into a business and agrees to accept a percentage of the profits, the information necessary for the evaluation of damages is peculiar to himself and the others who worked with him. The employer is no longer in the same position as the employee and cannot be expected to disprove the employee's

case as well as the employee is able to prove the amount of damages. Hence, whether or not the prevailing rule places the burden on the employer generally, in cases such as this we submit that the reasoning of Wheeler, J., in his concurring opinion in *Grant v. New Departure Mfg. Co.,* 85 Conn. 421, 83 Atl. 212 (1912), is especially appropriate, even though Connecticut is one of the jurisdictions following the minority view. In that opinion he said:

> "The doctrine that the employee, rather than the employer, should prove the inability of the employee to get work is sound in principle. The facts relating to the ability of the employee to get work are easily within his control. He knows, or may know, if he has done his duty. The employer may not know, though he be ever so diligent. After the employee leaves his service, he may go to some place quite unknown to his former employer. The employer cannot keep track of the whereabouts of his discharged employees and officials. Consider the burden this would place upon the employer of say 20,000. In practice it would result in most cases in the inability of the employer making such proof. He could not support the burden of proof. Hence the discharged employee would recover the face of his contract, and the rule of law limiting his recovery to his actual damage and compelling him to deduct from what his contract would have given him what he could have earned would be rendered nugatory. Such a result would be unjust to the employer and leave our law on this subject contradictory and illogical. It would violate two rules of law. The burden is on the party asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential. Wigmore, Evidence, §2486;

> Greenleaf, Evidence, §74. The burden is on the party who presumably has peculiar knowledge of a fact. Wigmore, Evidence, §2486." 85 Conn. at 428-429, 83 Atl. at 214.

In the instant case, appellee plainly failed to carry the burden of proof. As we pointed out above, the record is open to the interpretation that profits were earned by appellee during the contract period even though they may not have been drawn or paid before September 29, 1954. Likewise, the failure to draw more than $400.00 on account of such profits is not explained. Again, the important factor was not whether the money was drawn but whether appellee was entitled to an additional sum. Clearly, appellee had "peculiar knowledge of facts or control of evidence" to clarify and explain these points and therefore should be held to have had the burden of proof. 31 C. J. S. 721. Having failed to carry that burden, he should be denied recovery for the period June 7, to September 29, 1954.

Another principle supporting this conclusion should not be overlooked. Appellee, in accepting other employment, agreed to compensation based on a percentage of his employer's net profit. If he is entitled to recover from appellant for the period of such employment, he is then being given *carte blanche* to gamble at the expense of his former employer. For if the venture is profitable, the employee pockets all the gain; if unprofitable, the employer must pay him in full for wages lost. There is therefore every inducement for him to take exceptional risks instead of being compelled to abide by the ordinary rule placing on a complainant the duty to mitigate damages. At the very least, if the employee elects to gamble and the

venture proves unprofitable, the employer should be entitled to the fair value of the services the employee contributed to his new venture. Somebody, including the employee, received the benefit of those services, for without those services (even if the venture sustained a loss) there presumably would have been an even greater deficit to the employee and/or his co-venturer. It is unfair, therefore, to make the employer pay again for services that were beneficial to the complainant and his co-venturer.

II.

The Court Below Erred in Computing the Damages Due to Appellee.

In computing the sum of $3,600.00 due appellee (before allowing credit for the sum of $400.00), the court evidently allowed appellee the sum of $200.00 a week for each week between May 24 and September 29. The court erred in two respects.

In the first place, the court assumed that the contract began on September 29, 1952, because the letter-memorandum of agreement was dated September 29, 1952. In fact, however, appellee entered upon his employment on September 17, 1952 [Tr. p. 28], and the letter-memorandum merely served "to confirm [the] verbal agreement" apparently reached by the parties when the employment began [Tr. p. 6]. The contract therefore would have terminated on September 16, 1954, in any event, and appellee should have been paid to that date only. Hence, appellant is entitled to an adjustment for wages for a period of two weeks, or in the sum of $400.00.

The second error the court made in computing damages was in allowing appellee the sum of $200.00 a week

for wages rather than the sum of $175.00 a week as provided in the contract. Appellant had voluntarily paid appellee an additional $25.00 a week during part of the period immediately preceding appellee's dismissal. This extra payment was purely gratuitous on the part of the employer and was not legally binding upon him. Just as appellant had the right to give appellee an amount in addition to that called for by the contract, he had the similar right to withhold the additional payments without justifiable complaint on the part of appellee. Since an amount greater than that required to be paid under the contract was ordered by the court below, the court to that extent erred.

Conclusion.

We respectfully submit that the judgment of the court below should be modified by eliminating therefrom wages allowed for the period June 7, 1954, to September 29, 1954. Further, if this court should rule that such allowance should not be made, the judgment should nevertheless be modified by allowing recovery at the rate of $175.00 per week instead of $200.00 and only until September 16, 1954.

Dated: October 7, 1955.

Respectfully submitted,

SPIEGEL, TURNER & STEVENS,

Attorneys for Appellant.